

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

WENDY BALDWIN,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Respondent.

) Case No. DISM-00-0045

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and LEANA D. LAMB, Member. The hearing was held at the Airport Ramada Inn, Spokane, Washington, on April 10, 2001. GERALD L. MORGEN, Vice Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Wendy Baldwin was present and was represented by Christopher Coker, Attorney at Law, of Parr & Younglove, PLLC. Patricia Thompson, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for the causes of neglect of duty, willful violation of agency policy and gross misconduct. Respondent alleges that Appellant possessed drugs and drug paraphernalia at the work site.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

II. FINDINGS OF FACT

2.1 Appellant Wendy Baldwin was an Attendant Counselor 3 and permanent employee for Respondent Department of Social and Health Services at Lakeland Village. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on June 23, 2000.

2.2 By letter dated June 6, 2000, Al Kertes, Superintendent of Lakeland Village, notified Appellant of her dismissal effective at the end of her work shift on June 22, 2000. Mr. Kertes charged Appellant with neglect of duty, gross misconduct and willful violation of agency policy. Mr. Kertes specifically alleged that Appellant possessed drugs and drug paraphernalia at the work site on August 26, 1999.

2.3 Lakeland Village serves approximately 260 clients and houses the Institution for Mentally Retarded and a nursing facility for the physically and mentally handicapped. Respondent's primary expectation of its employees is that they care for the health and safety of clients and provide the required client treatment. As an Attendant Counselor 3, Appellant worked in the Pinewood cottage providing total care for clients with the approximate mental age of a 10 month old child. Appellant

1 was a shift charge with lead responsibilities over other attendant counselors. Appellant worked
2 from 3 p.m. to 11 p.m. Appellant had been a state employee for approximately 10 years.

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4 2.4 Appellant has a history of prior discipline and corrective action. By letter dated May 4,
5 1999, Appellant received a one-day suspension for failing to investigate the discovery of possible
6 drug related materials found in the employee restroom. By memo dated November 1, 1996,
7 Appellant received a letter of reprimand for sleeping while on duty.

8
9 2.5 On August 26, 1999, Deena Wasson, Attendant Counselor 1, saw Appellant enter the
10 employee bathroom at the end of their shift. Appellant had told Ms. Wasson earlier that she was
11 going out after work and Ms. Wasson believed Appellant was in the bathroom putting on makeup.
12 Appellant subsequently left work and received a ride from Eva Leech, Attendant Counselor 1.
13 Appellant was scheduled to be off work for the following three days.
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15
16 2.6 Mike Vermillion, Attendant Counselor 3, worked the 11 p.m. to 7 a.m. shift. Sometime
17 early in his shift, Mr. Vermillion entered the employee bathroom and noticed a makeup bag with a
18 pink flower design sitting on the bathroom sink. The bag, which had a zipper opening on the top,
19 was wide open. He observed that the bag contained numerous makeup items. In addition, Mr.
20 Vermillion noticed that the makeup bag also contained a small bottle. Inside the bottle was a short
21 straw that appeared to be one and one half inches long with one side cut at an angle and a small bag
22 containing a powdery substance. Mr. Vermillion reported the suspicious items to coworker Laura
23 Babb, who also observed the items in the small, flowered pink bag. Inside the bag was also a
24 Safeway shopping card.
25
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1 2.7 Ms. Babb called the Medical Lake Police Department (MLPD). The MLPD gathered the
2 evidence and took a report.
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4
5 2.8 On August 27, Appellant called Ms. Leech and asked if she had left her pink bag in Ms.
6 Leech's car. Ms. Leech did not find a makeup bag in her car. Appellant told Ms. Leech that she
7 had possibly left it at work. Appellant, who had received a ride to work the previous day from
8 coworker Torey Roberts, called and asked him to help her locate her makeup bag. Mr. Roberts,
9 who was assigned to work at another cottage, entered Pinewood cottage and asked Ms. Wasson if
10 she had found Appellant's makeup bag. After Ms. Wasson responded no, Mr. Roberts proceeded to
11 check throughout the cottage trying to locate the bag. Mr. Roberts conducted an extensive search of
12 the cottage, including the clients' grooming areas, the office, and bathroom. However, Mr. Torey
13 was unable to locate the bag. Appellant also called Ms. Wasson that day and asked if she had seen
14 her makeup bag.
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16
17 2.9 Ms. Wasson was familiar with Appellant's makeup bag, and although Ms. Wasson did not
18 see the bag which was found in the restroom, she did recall seeing Appellant's makeup bag on top
19 of a counter across from the employee bathroom on the evening of August 26. She described the
20 makeup bag as light in color, with a flower print pattern which zipped across the top.
21

22
23 2.10 Appellant admits that in August 1999, she owned a makeup bag with printed pink flowers
24 which zipped across the top and had an inner zipper. She also admits that she was unable to find
25 her makeup bag, which she contends contained makeup items, her identification card and
26 approximately \$200, on the evening of August 26. However, Appellant contends her make-up bag

1 had a black background and that Mr. Torey subsequently found her makeup bag in his car a few
2 days later. However, we do not find Appellant's testimony credible and we find that, more likely
3 than not, the makeup bag and its contents, including the drugs and drug paraphernalia, belonged to
4 Appellant.

5
6 2.11 MLPD Officer Russell Atchison performed tests on the substance found in the bag and
7 determined that it was methamphetamine, an illegal drug. The straw used to inhale the
8 methamphetamine is considered drug paraphernalia. However, the MLPD declined to conduct any
9 further investigation due to a lack of evidence and because the officer "did not follow the chain of
10 evidence." The discovery of the drugs and drug paraphernalia was also reported to the Washington
11 State Patrol (WSP). However, on September 10, 1999, the Traffic Investigation Division of the
12 WSP concluded there was not enough evidence to pursue a criminal case. No determination was
13 made as to the identity of the Safeway Club card owner, and the makeup bag was subsequently
14 destroyed by the police.

15
16 2.12 The incident was subsequently referred to the Internal Affairs Division of the Washington
17 State Patrol who conducted an administrative investigation. The findings of the investigation were
18 issued on April 4, 2000.

19
20 2.13 On April 26, 2000, a Conduct Investigation Report (CIR) was initiated against Appellant.
21 Subsection (5) of the CIR process allows Respondent to suspend initiating the CIR until
22 investigation by other authorities are completed. The April 4, 2000, Internal Affairs report and the
23 CIR were forwarded to Superintendent Kertes, who was Appellant's appointing authority. Prior to
24 determining whether misconduct occurred, Mr. Kertes held a pre-termination hearing with
25 Appellant, reviewed her personnel file, the WSP report and the statements of witnesses. When Mr.
26 Kertes reviewed the information before him as a whole, he found the evidence overwhelmingly

1 pointed to Appellant as the owner of the makeup bag and drugs and he did not find her denial
2 believable. When determining the level of discipline, Mr. Kertes considered that in her role as a
3 shift charge employee, Appellant had responsibility to care for handicapped clients who were
4 completely reliant on staff.

5
6 2.14 Mr. Kertes concluded that Appellant, who had received a previous letter of reprimand and a
7 letter of suspension, had demonstrated over time that she was not a reliable employee and he no
8 longer felt she could be trusted to provide the client care necessary. In Mr. Kertes' estimation,
9 Appellant's misconduct undermined the agency's mission to care for and act as agents for the
10 clients in their care, because clients had access to the employee restroom. Mr. Kertes concluded
11 that Appellant neglected her duty, committed gross misconduct and willfully violated agency rules
12 and regulations based on his determination that Appellant possessed drugs and drug paraphernalia
13 at the work site. Mr. Kertes concluded that termination was the appropriate sanction under the
14 circumstances.

15
16 2.15 Respondent has adopted Administrative Policy 6.01 which prohibits employees from
17 unlawfully possessing drugs or drug paraphernalia while on official business or on state owned
18 premises. Lakeland Village procedure 10.1 also cautions that employees will not possess drugs at
19 department work-sites or while on official department business. Appellant was aware of the
20 agency's policies and she most recently reviewed them on September 11, 1998.

21 **III. MOTION**

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23 3.1 At conclusion of Respondent's case in chief, Appellant moved to set aside the disciplinary
24 action on the basis that Respondent 1) failed to show by a preponderance of the credible evidence
25 that the disciplinary action was justified and 2) violated her right to due process by failing to
26 investigate potentially exculpatory evidence. Appellant argues that Respondent failed to show the

1 make-up bag found in the bathroom to Ms. Wasson, who could have identified whether or not it
2 belonged to Appellant. Appellant also argues that the police investigation failed to take any steps to
3 obtain the identity of the owner of the Safeway card thereby prejudicing her case.

4
5 3.2 Respondent argues that it presented sufficient evidence and it has met its burden of proof in
6 supporting the disciplinary action. Respondent argues that the actions taken by the police
7 department were entirely separate from its process and procedures. Respondent argues that it
8 appropriately followed and was in compliance with the CIR procedures. Respondent argues that it
9 has no control over the investigations performed by other authorities and should not be penalized by
10 what they did or did not do. Respondent asks the Board to deny the motion.

11
12 3.3 The Board considered the evidence and testimony presented and orally denied Appellant's
13 motion. In making its determination, the Board weighed the testimony of the witnesses and the
14 evidence presented by Respondent. The Board found sufficient evidence that Respondent properly
15 followed its own investigative procedures and presented sufficient credible evidence to establish a
16 *prima facie* case.

17 **IV. ARGUMENTS OF THE PARTIES**

18 4.1 Respondent argues that circumstantial evidence is as good as direct evidence and that in this
19 case, a preponderance of the evidence establishes that Appellant possessed the drugs, that she
20 brought them onto campus, and forgot them in the restroom. Respondent argues that witnesses
21 provided credible testimony and are believable. Respondent contends that the only person who
22 made an inquiry about the bag was Appellant and that the drugs contained in the bag were much too
23 valuable for someone else to try and frame Appellant. Respondent asserts that although Appellant
24 claims that she found her bag a few days later, there is no evidence to substantiate her claims.
25 Respondent asserts that the bag found in the bathroom was in fact Appellant's bag and contained
26

1 her drugs. Respondent argues that Appellant engaged in misconduct and that dismissal was the
2 appropriate sanction.

3
4 4.2 Appellant denies that the bag, drugs and drug paraphernalia were hers and asserts there was
5 no credible, direct or objective evidence to establish the makeup bag and items were hers.
6 Appellant argues that she was targeted and terminated based on assumptions and a lack of evidence.
7 Appellant asserts that the investigation conducted by the Washington State Patrol and the Medical
8 Lake Police failed to establish she was in possession of a controlled substance, that the agency
9 failed to begin its own investigation for over five months, and that the investigation was flawed.
10 Appellant agrees that she did call to ask about her bag, but asserts that when she found her own bag
11 two or three days later, she never asked about it again. Appellant contends she has been consistent,
12 and that no one ever saw her enter the restroom with a makeup bag. Appellant argues that her
13 appeal should be granted and she should be reinstated.

14 **V. CONCLUSIONS OF LAW**

15 5.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
16 herein.

17
18 5.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
19 the charges upon which the action was initiated by proving by a preponderance of the credible
20 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
21 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
22 Corrections, PAB No. D82-084 (1983).

1 5.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
2 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
3 of Social & Health Services, PAB No. D86-119 (1987).

4
5 5.4 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to
6 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

7
8 5.5 Willful violation of published employing agency or institution or Personnel Resources
9 Board rules or regulations is established by facts showing the existence and publication of the rules
10 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
11 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

12
13 5.6 Respondent has proven by a preponderance of the credible evidence that Appellant
14 possessed drugs and drug paraphernalia in the workplace. By bringing an illegal drug into the
15 workplace, Appellant jeopardized the well-being of clients who had access to the employee
16 restroom. Respondent has proven that Appellant neglected her duty and that her misconduct rose to
17 the level of gross misconduct when she failed to behave in a manner that supported the agency's
18 mission to care for its vulnerable clients. Furthermore, Appellant's misconduct was a willful
19 violation of the agency's policy on a drug-free workplace.

20
21 5.7 In determining whether a sanction imposed is appropriate, consideration must be given to
22 the facts and circumstances, including the seriousness and circumstances of the offenses. The
23 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to
24 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the
25 program. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

1 5.8 Under the facts and circumstances of this case, including the egregious nature of Appellant's
2 misconduct of bringing drugs and drug paraphernalia into the workplace, the sanction of dismissal
3 is not too severe.

4
5 **VI. ORDER**

6 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Wendy Baldwin is denied.

7 DATED this _____ day of _____, 2001.

8
9 WASHINGTON STATE PERSONNEL APPEALS BOARD

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11
12 _____
Walter T. Hubbard, Chair

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14 _____
Leana D. Lamb, Member